United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RASH GHOSH,

Plaintiff,

v.

CITY OF BERKELEY, et al.,

Defendants.

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No. C-14-2922 MMC

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS; DISMISSING AMENDED COMPLAINT; AFFORDING PLAINTIFF LEAVE TO AMEND; CONTINUING CASE MANAGEMENT CONFERENCE; VACATING JANUARY 16, 2015 HEARING

Before the Court are three motions to dismiss plaintiff Rash Ghosh's Amended Complaint ("AC"): (1) "Motion to Dismiss," filed November 13, 2014 by the City of Berkeley, Zachary D. Cowan, Laura McKinney, Mark Rhoades, Joan MacQuarrie, Matthew LeGrant, Patrick Emmons, Greg Heidenreich, and Malcolm D. Prince (collectively, "the City Defendants"); (2) "Motion to Dismiss Amended Complaint as to Defendant PG&E or, in the Alternative, for a More Definite Statement," filed November 13, 2014 by Pacific Gas and Electric Company ("PG&E"); and (3) "Motion to Dismiss," filed November 17, 2014 by the Berkeley Housing Authority and Tia Ingram (collectively, "BHA"). Plaintiff Rash B. Ghosh has filed opposition to each motion; defendants have separately replied. Having read and considered the papers filed in support of and in opposition to the motions, the Court deems

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the matters appropriate for determination on the parties' respective written submissions,[1] VACATES the hearing scheduled for January 16, 2015, and rules as follows.

A. PG&E: Service of Process

In its motion, PG&E argues it is entitled to dismissal, pursuant to Rule 12(b)(4) of the Federal Rules of Civil Procedure, on the ground it has not been served with a summons signed by the Clerk of Court.[2]

Rule 4 provides that a summons must "be signed by the clerk." See Fed. R. Civ. P. 4(a)(1)(F). Here, PG&E offers a copy of the summons it received, which document lacks the signature of the Clerk. (See Lee Decl., filed November 13, 2014, ¶ 6, Ex. 5.) Plaintiff has not offered any contrary evidence, and, consequently, has failed to meet his burden to show he properly served PG&E. See Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004) (holding where defendant challenges service, plaintiff has "burden of establishing that service was valid under Rule 4").

The Court next considers whether the failure to comply with Rule(a)(1)(F) entitles PG&E to relief. In the absence of a showing of prejudice, which showing PG&E does not make, a "technical error" in the form of a summons does not "invalidat[e] the process. See United Food & Commercial Workers Union v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984) (internal quotation and citation omitted). PG&E argues, however, that a failure

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[1]On January 8, 2015, after briefing on the motions was complete, plaintiff filed two declarations and a request for judicial notice. Under the Local Rules of this District, with two exceptions inapplicable to the instant matter, "[o]nce a reply is filed, no additional memoranda, papers or letters may be filed without prior Court approval." See Civil L.R. 7-3(d). Plaintiff did not seek, let alone obtain, leave to submit the January 8, 2015 filings, and, accordingly, those filings are hereby STRICKEN. The Court notes, however, that consideration of the January 8, 2015 filings would not affect the Court's ruling set forth below, as said filings do not address the issues the Court considers herein. The Court further notes that plaintiff, in violation of the Local Rules of this District, failed to provide a chambers copy of any of his January 8, 2015 filings. See Civil L.R. 5-2(b). Plaintiff is hereby DIRECTED to provide a chambers copy of all future filings.

[2]PG&E additionally argues that the service was untimely; in their respective motions, the City Defendants and BIA likewise assert the untimeliness of service. By separate order filed concurrently herewith, the Court has granted plaintiff's motion for an extension of time to serve defendants. Consequently, to the extent the motions to dismiss rely on the untimeliness of service, the motions are moot.

to comply with Rule 4(a)(1)(F) is not technical in nature. The Court agrees; no court has found the lack of a clerk's signature constitutes a technical error, cf. id. (identifying, as examples of "technical error[s]" in summons, failure to "name all of the defendants" and stating "incorrect time for filing of the answer"), and, indeed, those courts to have considered the matter have found a failure to serve a summons signed by the clerk renders the service invalid. See, e.g., Ayres v. Jacobs & Crumplar, P.A., 99 F.3d 565, 569-70 (3rd Cir. 1996) (holding service of summons not signed by clerk is "a nullity," as unsigned summons "does not confer personal jurisdiction over the defendant"); Taylor v. Logic 20/20 Inc., 2014 WL 1379603, at *3 (W.D. Wash. April 8, 2014) (holding failure to comply with Rule 4(a)(1)(F) "is not a mere technicality" and, consequently, service "attempt" consisting of delivery of summons unsigned by clerk "does not satisfy Rule 4"). Consequently, the Court finds PG&E is entitled to relief in light of plaintiff's failure to comply with Rule 4(a)(1)(F).

The Court next considers the type of relief to which PG&E is entitled, specifically, whether it is entitled to an order of dismissal or an order quashing service. See S.J. v. Issaquah School Dist. No. 411, 470 F.3d 1288, 1293 (9th Cir. 2006) (holding, where service of process is insufficient, district court has "discretion to dismiss [the] action or quash service"). Courts have recognized that "when there exists a reasonable prospect that service may yet be obtained," the appropriate remedy is to quash service and afford the plaintiff leave to "effect proper service." See Umbenhauer v. Woog, 969 F.2d 25, 30-31 (3rd Cir. 1992) (citing authority); see also Hickory Travel Systems, Inc. v. TUI AG, 213 F.R.D. 547, 555 (N.D. Cal. 2003) (holding "quashing service is the typical remedy if initial defects in service might be corrected"); see, e.g., Taylor, 2014 WL 1379603, at *4 (affording plaintiff, who had served unsigned summons on defendant, extension of time to serve signed summons).

Here, as plaintiff has served other defendants with a summons signed by the Clerk (see, e.g., Pl.'s Proof of Service as to Mark Rhoades, filed November 18, 2014 at 2), there exists a reasonable prospect plaintiff could serve a signed summons on PG&E. Further,

given the early stage of the proceeding and no assertion by PG&E that it has been prejudiced by the insufficient service, the Court finds it appropriate to quash service and afford plaintiff leave to properly serve PG&E, within the time limit set forth below.

Accordingly, to the extent PG&E's motion to dismiss is based on a failure to serve, the motion will be denied and, in the alternative, the Court will quash service on PG&E and afford plaintiff leave to effectuate proper service on said defendant.

B. All Defendants: Failure to Provide Fair Notice of Claims

In their respective motions, the City Defendants, PG&E and BIA contend plaintiff, in violation of Rule 8(a), has failed to provide fair notice as to the nature of his claims.

Rule 8(a) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." See Fed. R. Civ. P. 8(a)(2). A complaint complies with Rule 8(a) when it "sets forth who is being sued, and on what theory, with enough detail to guide discovery." See McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996). By contrast, a complaint that lacks "simplicity, conciseness and clarity as to whom [a plaintiff is] suing for what wrongs, fails to perform the essential functions of a complaint," and is subject to dismissal. See id. at 1180; see also Cafasso v. General Dynamics C4 Systems, Inc., 637 F.3d 1047, 1059 (9th Cir. 2011) (noting, "[w]hile the proper length and level of clarity for a pleading cannot be defined with any great precision, Rule 8(a) has been held to be violated by a pleading that was needlessly long, or a complaint that was highly repetitious, or confused, or consisted of incomprehensible rambling") (internal quotation and citation omitted).

Here, the AC, in which plaintiff has named sixteen defendants, consists of thirty-nine pages of text, to which plaintiff has attached approximately twenty-six exhibits, many with multiple sub-parts. The text of the AC, read in light of the exhibits, generally refers to real property that was previously owned by plaintiff and has been the subject of permit disputes over the course of more than two decades. (See, e.g., AC ¶ 8 (referring to "Permit 91-2004" as having been "opened" in 1991); AC ¶ 15 (stating "Permit 98-2018" was "created without [p]laintiff's knowledge" in 1998); AC ¶ 86 (alleging City of Berkeley, on unidentified

date or dates, "recycled . . lies" regarding "revised building permit plans").) The AC also refers to various state court actions that have, or may have, addressed some of the court rulings and administrative acts alluded to in the AC and/or the present status of the subject real property. (See, e.g., AC ¶¶ 20, 53-54, 57; see also Exs. B1, B2, and N1.)

The AC, however, fails to give the moving defendants notice of the particular claim or claims plaintiff is pursuing in this action. Specifically, it is unclear whether plaintiff's references to permits issued as far back as the early 1990s, as well as references to court decisions concerning some of those permits and other matters pertaining to plaintiff's real property, are meant to provide background for the claim(s) plaintiff seeks to assert in the instant action, or whether plaintiff intends in the instant action to seek review of all or some of the permits and related decisions. If the former, the AC "consists largely of immaterial background information," see McHenry, 84 F.3d at 1177, while lacking sufficient identification of the actual claims plaintiff intends to pursue in this action. If the latter, defendants have the right to sufficient notice of the claims to determine if it is appropriate to raise at the pleading stage affirmative defenses, such as the statute or limitations or claim preclusion, to avoid the burden of discovery. See, e.g., Scott v. Kuhlmann, 746 F.2d 1377, 1378 (9th Cir. 1984) (affirming dismissal at pleading stage of claim that previously was "rejected" by a court in an earlier lawsuit brought by plaintiff); Weisbuch v. County of Los Angeles, 119 F.3d 778, 783 n.1 (9th Cir. 1997) (holding where complaint pleads allegations "compelling" a particular decision, there is no need for "depositions and other expensively obtained evidence on summary judgment to establish[ ] the identical facts").

In sum, the Court and defendants "cannot determine from the [AC] who is being sued, for what relief, and on what theory, with enough detail to guide discovery," as the AC fails to include "clear and concise averments stating which defendants are liable to [plaintiff] for which wrongs." See McHenry, 84 F.3d at 1178.

Accordingly, as to the moving defendants, the AC is subject to dismissal for failure to comply with Rule 8(a). Further, the failure to comply with Rule 8(a) is a deficiency wholly applicable to those defendants who have yet to appear, and, consequently, the AC will be

dismissed as to all defendants. See Silverton v. Dep't of Treasury, 644 F.2d 1341, 1345 (9th Cir. 1981) (holding, where court grants motion to dismiss as to one defendant, court may dismiss claims against non-moving defendants "in a position similar to that of moving defendants").

In his oppositions to the motions, plaintiff requests leave to amend to clarify the basis for his claims, which leave the Court will grant. See, e.g., Schmidt v. Herrmann, 614 F.2d 1221, 1223 (9th Cir. 1980) (noting, where plaintiff's complaint failed to comply with Rule 8(a), district court, prior to dismissing action with prejudice, afforded plaintiff leave to amend complaint). Specifically, plaintiff will be afforded leave to amend "to present a short, simple, concise, and direct statement respecting the alleged wrongdoing of each [defendant]," see id., and to "state[ ] clearly how each and every defendant violated [plaintiff's] legal rights," see McHenry, 84 F.3d at 1176.

CONCLUSION

For the reasons stated above, defendants' motions to dismiss are hereby GRANTED, and the Amended Complaint is hereby DISMISSED as to all defendants.

Plaintiff's request for leave to amend is hereby GRANTED, and plaintiff shall file any Second Amended Complaint ("SAC") no later than February 6, 2015.

Plaintiff's attempt at service on PG&E is hereby QUASHED, and the deadline for service on PG&E is EXTENDED. Specifically, if plaintiff elects to allege claims against PG&E in any SAC, plaintiff is hereby DIRECTED to serve PG&E with a valid summons and the SAC no later than February 21, 2015, and, further, to file proof of such service no later than February 28, 2015.

In light of the above, the Case Management Conference is hereby CONTINUED from February 13, 2015 to May 1, 2015, at 10:30 a.m. A Joint Case Management Statement shall be filed no later than April 24, 2015.

IT IS SO ORDERED.

Dated: January 12, 2015

MAXINE M. CHESNEY
United States District Judge